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International Convention for the Protection of All Persons from Enforced Disappearance

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Committee on Enforced Disappearances

Concluding observation on the report submitted by Germany under article 29, paragraph 1, of the Convention

Addendum

Information submitted by Germany in response to the concluding observations *

[Date received: 14 April 2015]

I. Introduction

1. On 27 March 2014 the Committee on Enforced Disappearances (CED) adopted its concluding observations on the report submitted by the Federal Republic of Germany under Article 29 paragraph 1 of the Convention (CED/C/DEU/1). Pursuant to margin number 33 of these concluding observations, relevant information is to be provided, in accordance with the committee's rules of procedure, by 28 March 2015 at the latest, on the implementation of the committee's recommendations made under margin numbers 8, 9 and 29.

2. The Federal Government would like to thank the committee for the open and constructive dialogue on the German state report held at the United Nations on 17 and 18 March 2014, and hereby submits its remarks on the above-mentioned concluding observations.

II. Information on margin number 8 of the concluding observations

3. Article 4 of the Convention contains the obligation for States Parties to ensure that the different forms of enforced disappearance specified in Article 2 of the Convention are sanctioned comprehensively under criminal law. This gives rise to a general obligation for States Parties to prosecute perpetrators of the conduct specified in Article 2 under their system of criminal law. However, the Federal Republic of Germany does not see how Article 4 can be interpreted as giving rise to an obligation to create a separate criminal offence of "enforced disappearance". The Federal Government considers the offences

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already defined in German criminal law, combined with the provisions of other acts, to be sufficient for the adequate investigation and punishment of cases of enforced disappearance. In particular, all aspects of the conduct criminalised in the Convention can essentially be subsumed under existing criminal law provisions. In this connection, the Federal Government once again refers to the range of criminal offences named in the report by the Federal Republic of Germany under Article 29 of the Convention and the reply to the list of issues (see margin numbers 9, 23 and 28-42 of the report; see margin numbers 9 and 12-14 of the reply to the list of issues).

4. At the same time, the Federal Republic of Germany does not fail to recognise the symbolic effect of having a separate criminal offence of enforced disappearance in the Criminal Code, nor does it deny the possibility of considering improvements which go beyond the obligations entered into under the Convention. Talks have already been held at the Federal Ministry of Justice and Consumer Protection, including with Amnesty International, to discuss the various opinions that exist on these matters, as well as potential regulatory approaches. Furthermore, on 5 November 2014, the CED's concluding observations were discussed by the responsible body in parliament (Human Rights Committee of the German Bundestag). Members of parliament were given an oral briefing by representatives of the Federal Government. This briefing included a discussion of the legal situation and the recommendations in the context of the German legal system. In particular, this pertains among other things to the need for a sufficient limitation period and the system of limitations provided for in German criminal law. In this context, we refer also to our statements under point III on margin number 9 of the concluding observations.

III. Information on margin number 9 of the concluding observations

(a) Call to establish the specific mitigating and aggravating circumstances provided for in Article 7 paragraph 2 of the Convention when criminalising enforced disappearance as an autonomous offence, and to ensure appropriate punishment even in the case of mitigating circumstances

5. The Federal Government believes that the aggravating and mitigating circumstances foreseen in German criminal law fully reflect the meaning of Article 7 paragraph 2.

(i) Aggravating circumstances

6. Article 7 paragraph 2 letter (b) specifies the following as aggravating circumstances:

(1) Death of the disappeared person, or

(2) This person is a pregnant woman, a minor, a person with a disability or another particularly vulnerable person.

7. On (1) In Germany, a range of criminal provisions relevant to enforced disappearance pertains to actions that are particularly likely to be accompanied by a risk of death. Causing death through an act fulfilling the elements of one of these criminal offences either constitutes a serious offence in itself or leads to a higher penalty (compared to the underlying offence) as an "aggravating factor". This regime exists independently of the applicable provisions on murder in sections 211 and 212 of the Criminal Code (*Strafgesetzbuch*, StGB), which pertain to intentional homicide. Noteworthy in this respect are the following:

- Section 239 (4) StGB (unlawful imprisonment *causing death*, which carries a custodial sentence of up to 15 years but no less than three years);
- Section 235 (5) StGB (abduction of minors *causing death*, which carries a custodial sentence of up to 15 years but no less than three years);

- Section 227 StGB (inflicting bodily harm *causing death*, which carries a custodial sentence of up to 15 years but no less than three years);
- Section 221 (3) StGB (abandonment *causing death*, which carries a custodial sentence of up to 15 years but no less than three years).

8. On (2) The wrong inherent in subjecting a minor to enforced disappearance is, first of all, reflected through section 235 StGB in particular (abduction of minors from the care of their parents etc.). Furthermore – as foreseen in Article 7 paragraph 2 – the fact that a disappeared person is a minor, is pregnant, is disabled or is another particularly vulnerable person, would be taken into consideration pursuant to the sentencing provisions of section 46 (2) StGB (if the victim's status as such is not already one of the elements of the offence, e.g. in section 235 StGB with regard to minors). Within the framework of section 46 (2) StGB, consideration is also given to the consequences of the offence for the victim, to the extent that the offender is to blame for them, if, for example, particularly serious consequences are foreseeable to the perpetrator in the case of a particularly vulnerable victim.

(ii) Mitigating circumstances

9. Mitigating circumstances as listed in Article 7 paragraph 2 letter (a) – e.g. helping shed light on cases of enforced disappearance – can also be taken into account on the basis of already existing provisions:

10. Some of the definitions of offences in German criminal law that are relevant to enforced disappearance contain explicit rules on "less serious cases":

- Section 234a (2) StGB (political abduction *in less serious cases*);
- Section 235 (6) StGB (abduction of minors from the care of their parents etc. *in less serious cases*);
- Section 225 (4) StGB (abuse of position of trust *in less serious cases*);
- Section 226 (3) StGB (causing grievous bodily harm *in less serious cases*);
- Section 227 (2) StGB (infliction of bodily harm causing death *in less serious cases*);
- Section 213 StGB (murder under *mitigating circumstances* – i.e. also a "less serious case")
- Section 221 (4) StGB (abandonment *in less serious cases*);

The conduct specified in Article 7 paragraph 2 letter (a) of the Convention can result in the assumption of a "less serious case" within the meaning of the provisions listed above.

11. All provisions on the above-mentioned less serious cases nevertheless guarantee adequate punishment. While these provisions foresee a downward shift in the applicable sentencing range as compared to the underlying offence/aggravated cases, this sentencing bracket lower down the scale does not mean limiting punishment to the imposition of a fine. In fact, increased minimum terms of imprisonment apply, i.e. prison sentences that exceed the regular minimum term.

12. In addition to the special rules mentioned above, section 46 (1), first sentence, StGB must be taken into account when determining the exact sentence to be imposed within the applicable sentencing bracket. This provision specifies that the court shall take the offender's guilt as the basis for its sentencing decision. Pursuant to section 46 (2) StGB, the court shall weigh up the circumstances which speak for and against the perpetrator in doing so. Section 46 (2) StGB cites the perpetrator's conduct after the offence, particularly his/her efforts to make restitution for the harm caused, and his/her efforts to achieve mediation

with the aggrieved party, as circumstances to be taken into account. Efforts by the perpetrator to contribute towards the investigation of the offence can also be considered as mitigating circumstances. Mitigating circumstances may be taken into account within the context of section 46 StGB, particularly if they have not already been considered in assuming a "less serious case" and thus in justifying a downward shift in the sentencing range (see above); if they have already been considered in shifting the sentencing range, they may still be taken into account during sentencing itself, but only to a lesser extent.

13. The system of provisions on aggravating factors and less serious cases, which is typical of the German legal system, will be part of the discussion on potential regulatory approaches to achieving criminal law improvements in the field of enforced disappearances.

(b) Call for an adequate statute of limitations

14. The applicable law already ensures, in the form of section 78 StGB, that the statute of limitations for enforced disappearance is in line with Article 8 and, in particular, that it reflects the extreme seriousness of the offence. Section 78 StGB provides that the length of the limitation period will depend on the seriousness of the offence as determined by the maximum term of imprisonment possible for the offence. There is no statute of limitations at all for murder, as provided by section 78 (2) StGB. For other offences, section 78 (3) StGB contains the following applicable provisions in particular: If the maximum penalty is life imprisonment, the limitation period is 30 years (number 1); the limitation period is 20 years in the case of offences punishable by a maximum term of imprisonment of more than ten years (number 2), and ten years in the case of offences punishable by a maximum term of imprisonment of more than five years but no more than ten years (number 3).

15. For the most important criminal offences in German law that are relevant to the enforced disappearance of persons, this means the following: There is no statute of limitations at all for murder (section 211 StGB), as provided by section 78 (2) StGB (see above). The statute of limitations is twenty years for unlawful imprisonment causing death (section 239 (4) StGB), political abduction (section 234a StGB), abduction of minors from the care of their parents causing death (section 235 (5) StGB), abuse of position of trust causing a danger of death or serious injury (section 225 (3) StGB) and infliction of bodily harm causing death (section 227 StGB). The limitation period expires after ten years in cases of unlawful imprisonment by depriving the victim of freedom for more than one week or causing serious injury to the victim (section 239 (3) StGB), abduction of minors from the care of their parents by placing the victim in danger of death or serious injury, or committing the offence for material gain (section 235 (4) StGB), abuse of position of trust (section 225 (1) StGB), and causing grievous bodily harm (section 226 StGB).

16. If the enforced disappearance of the individual also constitutes a crime against humanity within the meaning of section 7 of the Code of Crimes against International Law (*Völkerstrafgesetzbuch*, VStGB), section 5 of that code provides that neither criminal prosecution of the offence nor enforcement of the penalty imposed for the offence is subject to a statute of limitations.

17. Furthermore, section 78a StGB already provides that the limitation period shall begin to run only once the act has been completed. If a result constituting an element of the offence occurs later, the limitation period will commence to run only from that time. In the case of continuous offences, where an illegal situation is not only established but also maintained, e.g. in the case of illegal imprisonment, the limitation period begins to run after the illegal situation has ended, i.e. only once the victim has been released.

IV. Information on margin number 29 of the concluding observations

Article 25 paragraph 1 letter (a)

18. Article 25 paragraph 1 letter (a) concerns punishment under criminal law of the wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance, or children born during the captivity of a mother subjected to enforced disappearance.

19. The Federal Government permits itself the remark that Article 25 paragraph 1 letter a) of the Convention does not itself establish any obligation for the States Parties to create a specific criminal offence for the conduct referred to in this Article. The provision contains merely a general duty to punish.

20. Independently of this, the German Criminal Code already contains a special offence which covers the conduct specified in Article 25 paragraph 1 letter (a) and provides for adequate penalty:

21. At the centre of the injustice relevant here is the violation of parental/family custody rights over the child on the one hand, and the violation of the child's right to be cared for by its parents on the other. The offence of "abduction of minors from the care of their parents etc." (section 235 StGB) is already in place with the particular aim of prosecuting such violations: The legal interests protected by section 235 StGB are both parental/other custody rights under family law and the rights of the person being removed (child or youth). Pursuant to section 1631 of the Civil Code (*Bürgerliches Gesetzbuch*, BGB), care under family law entails the right to care for, bring up and supervise the child and to specify its abode, as well as the right to unhindered personal access to the child. As a more specific manifestation of the minor's right to personal liberty, the protection of a removed minor pertains to his/her physical, mental and emotional integrity, as well as his/her unhindered development

22. In particular in order to accommodate this aspect of protection for removed minors, the German legislature extended the offence under section 235 StGB as of 1 April 1998 with the Sixth Criminal Law Reform Act, introducing a felony in section 235 (4) number 1 StGB carrying a sentence of one to ten years' imprisonment for cases where the perpetrator endangers the victim's life, risks serious damage to the victim's health or places the victim at risk of substantial impairment of his/her physical or mental development. Also as part of these reforms, criminal liability was extended to include the secret removal of infants, as was the removal of children in order to take them abroad (section 235 (1) number 2, (2) StGB). In addition, the attempt to commit these acts was also criminalised (section 235 (3) StGB). Furthermore, the legislature introduced provisions on aggravating factors resulting in a considerable upward shift in the sentencing range (from one to ten years' imprisonment) for cases where the act is perpetrated for material gain or with the intent of enrichment, or where the act causes the death of the minor (section 235 (4) number 2, (5) StGB). Finally, the legislature turned what was formerly an offence prosecuted exclusively upon request into one which can also be prosecuted without such motion, thus better reflecting the child's interests. This means that prosecuting authorities can intervene *ex officio* in cases under section 235 (1) to (3) StGB as well (section 235 (7) StGB).

23. The provisions of section 235 StGB are also accompanied by provisions on child trafficking, a criminal offence under section 236 StGB. Section 236 (2) StGB criminalises the unlawful procurement of an adoption of a person under eighteen years of age (subsection (2) number 1), as well as unlawful involvement in procurement activity with the aim of a third person taking a person under eighteen years of age into his/her home for an indefinite period. Section 236 (4) StGB contains provisions on aggravating factors for cases where the offender seeks profit, acts on a commercial basis or acts as a member of a

gang (subsection (4) number 1), and for cases where the act places the child or procured person at risk of substantial impairment of his/her physical or mental development (subsection (4) number 2).

24. With section 235 StGB, therefore, German criminal law already contains a specific criminal offence which covers the acts named in Article 25 paragraph 1 letter (a) and the accompanying violation of the parent-child relationship, as well as of the child's right to unhindered development. Furthermore, specific acts consisting in the unlawful procurement of an adoption or taking a person under 18 years of age for an indefinite period, which may typically be an element of child abduction, are covered by the specific offence of child trafficking (section 236 StGB).

Article 25 paragraph 1 letter (b)

25. Article 25 paragraph 1 letter (b) concerns the falsification, concealment or destruction of documents attesting to the true identity of the children referred to under letter (a).

26. The Convention contains only a general duty to punish; in this connection, the Federal Government refers to its comments under margin number 19 above.

27. The conduct specified in Article 25 paragraph 1 letter (b) is already punishable under German law as forgery (section 267 StGB), causing wrong entries to be made in public records (section 271 StGB), tampering with official identity documents (section 273 StGB), suppression of documents (section 274 StGB) and falsification of personal status (section 169 StGB). These provisions cover all imaginable actions, i.e. the falsification, destruction and concealment (which corresponds to "suppression" under German criminal law) of identity documents. The offending items might include private records and documents, public documents, official identity documents, books, data storage media or registers, as well as technical recordings and data with evidentiary value. In particular, section 271 StGB provides that the provision of false information leading to the recording or storage of legally relevant but false declarations, negotiations or facts in public documents, books, data storage media or registers, shall incur criminal liability. The criminal offence of falsification of personal status (section 169 StGB) already covers the mere provision of false information on, or the suppression of, another's (e.g. a child's) personal status vis-à-vis a public authority responsible for the maintenance of personal status registers or the determination of personal status. The provision of a false declaration will suffice to fulfil the elements of the offence, i.e. the declaration does not necessarily have to result in a false entry.

28. The exact wording of the above-described provisions of the German Criminal Code is once again included in the annex to this document.